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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 860

MILES H. ROBINSON, M.D., Petitioner,

vs.

R. W. STEVENS, M.D., Et Al., Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1957. Petition to Stay Mandate and Retax Costs was denied December 31, 1957. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

Petitioner quotes the following as one of two bases for jurisdiction:

> "Important questions of local law probably in conflict with applicable local decisions." (Pet. 2)

This basis governing review, mistaken by petitioner as a basis of jurisdiction, is quoted from former Rule 38 and was eliminated by the Revised Rules effective July 1, 1954.

QUESTIONS PRESENTED

We disagree with petitioner's statement of the questions involved for the following reasons:

Question No. 1: No question of monopoly was raised by the pleadings, presented to the trial court or to the Court of Appeals and consequently no question of monopoly is in the record before this Court. See Complaint, R. 3; Designation of Points on Appeal, R. 1667; See **Tyrrell v. District of Columbia**, 243 U.S. 1, 61 L. Ed. 557.

Question No. 2: The American Medical Association was dismissed by the District Court on a preliminary motion to quash the service. The action of the District Court was not excepted to and the propriety of the order quashing service was not presented to or considered by the Court of Appeals.

Questions Nos. 3 & 4: The Fifth Amendment was not raised by the pleadings, was not presented to the District Court or to the Court of Appeals, and con-

sequently no exception to any adverse ruling was or could have been taken to the Court of Appeals. No evidence of facts framing an issue within the Fifth Amendment was presented at the trial.

Question No. 5: The action of the Court of Appeals directing petitioner to pay the costs of printing the record is not a question which forms the basis for the petition for certiorari. This question is referred to in the argument herein.

Question No. 6: Whether the reversal by the Judicial Council of the A. M. A. required the overruling of the respondents' motion to dismiss by the District Court does not present a question as the basis for the petition for certiorari, but goes only to the merits of the case.

Question No. 7: This question is merely a restatement of No. 6.

STATEMENT

This litigation involves an action by petitioner for conspiracy in his expulsion from the Walla Walla Valley Medical Society on the grounds of unprofessional conduct. It was tried by the District Court, a jury having been waived by all parties. (R. 83)

In 1950, the Medical Society organized a grievance committee of three doctors to iron out minor differences between doctor and patient, particularly as concerned fee complaints. (R. 1281)

The names of the committee were not given out at first to protect the members of the committee from crank calls and annoyances. (R. 1284-5)

During the late summer of 1950 three small grievances were processed informally by the committee. One involved a $1.50 charge made by petitioner to a Mrs. Edwards which grew out of a misunderstanding over a prescription. Dr. Stevens, committee chairman, discussed it with petitioner but found him highly resentful that the committee should concern itself about such a matter. Petitioner wrote concerning the grievance committee:

> "I deny absolutely the right of either layman or doctor to officially censor my financial arrangements with my patients." (R. 729)
>
> "Lastly, you should abolish this secret Grievance Committee and elect a committee on ethics specifically instructed to deal only with medical practice and never with fees." (R. 746)

The committee wrote a conciliatory letter to the complaining patient Edwards, in an effort to settle the dispute, sending a copy to petitioner (R. 719-720), who was greatly incensed by the committee's action. Petitioner demanded the original letter from Edwards, and upon being refused it, approached Mr. Brooks (father of Mrs. Edwards) and threatened that if Brooks did not get the original letter for him, petitioner would divulge the physical condition (syphilis) of Mr. Brooks and his wife (patients of petitioner) to

other members of the family and to the public authorities. (R. 1046-1050)

Because of this threat Brooks filed a complaint against petitioner with the Medical Society. This was heard by the trustees and the members of the Society after full opportunity for defense. (R. 1315) The grievance committee of the Washington State Medical Association also heard the matter and recommended disciplinary action. Petitioner was expelled for his unprofessional conduct, and appealed to the Judicial Council of the A.M.A., which reversed the expulsion on the procedural grounds that the existing procedure which provided for the trustees of the State Association to approve the action of its grievance committee disqualified these trustees as an impartial appellate group. In its opinion, however, the A.M.A. Judicial Council pointed out that its decision was not based on any finding that petitioner was innocent of wrongdoing, but only on the technical ground that the appellate procedures involved were deemed inadequate. After the A.M.A. determination, petitioner was promptly reinstated.

Petitioner then sued the local society, its officers, the complaining patients, the local hospitals, the Washington State Medical Society and the A.M.A., alleging conspiracy to expel him. (R. 3) The A.M.A. was dismissed on grounds of lack of jurisdiction. The case was tried over a five-week period. Petitioner was represented by able counsel. The action was dismissed

under authority of Rule 41 (b) Federal Rules of Civil Procedure.

The District Court found no conspiracy existed and that all actions of respondents were done in good faith and in substantial compliance with the existing constitutions and by-laws of the medical groups involved. (R. 1637-1642)

Petitioner appealed to the Court of Appeals, which sustained the District Court (Pet. 30)

ARGUMENT

Petitioner raises no question which warrants review by this Court on certiorari.

Petitioner does not contend that the Court of Appeals has decided an important question of Federal law which has not been, and which should be, settled by this Court, or that it has decided a Federal question in any way in conflict with applicable decisions of this Court.

Petitioner's action is one for damages for injuries alleged to have been sustained from an alleged conspiracy to injure him professionally. It is based only upon the common law of the State of Washington. It was tried to the Federal District Court sitting without a jury. The District Court dismissed the action for failure of petitioner to prove that the alleged conspiracy existed.

Basically, the petition for certiorari requests this Court to review the finding of the District Court, affirmed by the Court of Appeals, that no conspiracy existed. Only a question of fact is involved.

To establish his cause of action under Washington law, petitioner was required to prove that the respondents combined in furtherance of a preconceived plan to unlawfully expel him and that overt acts were done in accordance with the plan to his injury. **Quackenbush v. State**, 1942, 12 Wn. (2d) 201, 206, 121 P. (2nd) 331.

Although conspiracy may be proved by circumstantial evidence, mere suspicion is not enough and where the facts and circumstances relied on are as consistent with a lawful purpose as with an unlawful undertaking, a conspiracy is not proved. **Baun v. Lumber Etc. Union**, 1955, 46 Wn. (2d) 645, 656, 657.

These factors were taken into account by the trial judge in reaching his decision to dismiss petitioner's action on the merits. (R. 1636-1640)

The District Court viewed the weight of the evidence, not as being merely insufficient to sustain the petitioner's burden, but in fact preponderating in favor of the respondents.

In these words the trial court found there was in fact no conspiracy:

> "Now, much has been said about the burden of proof here in this case. I am not too much concerned about that, whether it should be by pre-

ponderance of evidence or clear, cogent and convincing evidence, because I have come to the conclusion there isn't any conspiracy here * * * " (R. 1637)

" * * * because after having this matter fully presented and after considering the documentary evidence and hearing most of the individual defendants testify and having the benefit of those intangible factors that come from seeing witnesses, hearing them, sizing them up and judging what their motives are and what credit may be given to their testimony, and, as I say, I think that is one of the skills that come with practice on the trial bench; I have found it so—I have come to the conclusion that not only is there insufficient evidence of a conspiracy, but there never was a conspiracy in fact in this case." (R. 1640)

After full hearings, the petitioner was disciplined by the Walla Walla Medical Society for having threatened to expose, and for having actually exposed, the confidences of his patients, Mr. and Mrs. Brooks, in an effort to procure a certain letter. At the hearing on the Brooks' charge before the board of trustees of the Society November 21, 1950, petitioner was questioned point blank by Dr. Page about his threatening Mr. Brooks and coupling that threat with a demand for the original of the grievance committee letter to the Edwards. Given the direct opportunity to deny the charges against him, this is all that petitioner had to say:

Dr. Page: At a prior time in his complaint he states that you have a copy of that letter and that

you had indicated if he did not get this letter for you that you would turn this whole idea of reporting to members of his family that he had syphilis, and if he did it you would not.

Dr. Robinson: It is a little hard to remember what you might say when angry, but I recall something about taking back into the happy family. (Emphasis ours) (R. 837-841)

Had petitioner been genuinely concerned about the welfare of Mr. and Mrs. Brooks and their family, he would have offered them the opportunity to place themselves under the care of another doctor who would assume responsibility for their cases. They were not given this choice. Rather, Dr. Robinson, in effect, issued the ultimatum: "Remain my patient on my terms or be exposed." He threatened to reveal the disease to other members of the family and the public authorities if the doctor-patient relationship were discontinued (R. 652-653), and he made it a condition of continuing the relationship that the letter be obtained and brought to him. (R. 652-654) Dr. Robinson's conduct amounts to a shocking disregard of the rights and interests of his patient, Mrs. Brooks, who was an innocent and unconsulted bystander. (R. 655) Petitioner's long and complicated efforts to justify this conduct have failed to satisfy everyone who has sat in judgment on the matter, including the District Court and the Court of Appeals.

The findings of the District Court that no conspiracy in fact existed, that petitioner's expulsion was the

logical and natural result of his own conduct, and that the respondents acted in good faith throughout all of the proceedings are amply supported by all the evidence in the case. In fact, they are the only reasonable inferences to be drawn from the testimony of petitioner himself.

The District Court did not, as petitioner contends, sanction disciplinary procedures by the local and state medical societies which might deprive a member of a property right without due process of law. It denied petitioner's plea for damages because it found the societies had acted in good faith and in substantial compliance with their constitutions and by-laws. (Finding XIII, R. 104) From the beginning to the end of the disciplinary proceedings against the petitioner, he was given ample notice and full opportunity to present his side of the case. (R. 832, 842-850)

Nor, as he claims, did the District Court sanction the expulsion and punishment of petitioner, "for exercising his right of free speech in criticism of affairs in his medical union." (Pet. 27) It denied petitioner's request for damages because it found petitioner's expulsion was the natural and logical result of his own conduct. (Finding XV, R. 105) The right of free speech does not include the right to violate the ethics of the medical profession and expose the confidence of medical patients with impunity.

Petitioner lists, as a question presented, the action

of the Court of Appeals in directing the petitioner to pay the printing costs for including the entire evidence within the transcript of the record. This order was entered because the Designation of Points on Appeal required the Court of Appeals to consider all of the evidence in the case and petitioner had designated for printing only a small portion of the testimony. Obviously the Court of Appeals could not pass upon the order dismissing the action at the close of the petitioner's case without having all of the evidence before it. The granting of the order by the Court of Appeals was a proper exercise of its descretion.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES F. LUCE
Counsel for Respondents.

April 12, 1958